UNITED STATES OF AMERICA
BEFORE THE U.S. DEPARTMENT OF ENERGY

Southwest Area National Interest Electric Transmission Corridor and Mid-Atlantic Area National Interest Electric Transmission Corridor	Docket No. 2007-OE-02 Docket No. 2007-OE-01

APPLICATION FOR REHEARING AND MOTION FOR IMMEDIATE STAY OF THE DEPARTMENT OF ENERGY'S OCTOBER 5, 2007 ORDER DESIGNATING THE SOUTHWEST AND MID-ATLANTIC NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDORS

FINAL RULING ON MERITS REQUESTED WITHIN 30 DAYS OF APPLICATION

The Wilderness Society, the Natural Resources Defense Council, Inc., Forest Guardians, Western Resource Advocates, and the California Wilderness Coalition (the "Parties"), pursuant to the Department of Energy's ("DOE's") October 5, 2007 Order designating the Southwest Area and the Mid-Atlantic Area National Interest Electric Corridors (collectively "NIETCs") (hereinafter "Order"), hereby seek both a rehearing of and an immediate stay of the Order pending any rehearing and judicial review.[1] *See* National Electric Transmission Congestion Report, 72 Fed. Reg. 56992, 57026 (Dep't of Energy Oct. 5, 2007). This Application requests a rehearing and immediate stay as to both NIETC designations.[2]

[1] The Parties submit this Application and Motion as a protective matter, in response to Ordering Paragraphs C through E of the Order (which direct parties to "apply for rehearing pursuant to FPA section 313," *see* 72 Fed. Reg. at 57026) and on the advice of DOE counsel in a November 1, 2007 phone conversation. The Parties do not concede that Section 313 of the Federal Power Act ("FPA"), codified at 16 U.S.C. § 825*l*, governs either administrative or judicial review of this Order, and reserve the right to bring an action challenging the Order pursuant to other authority including, but not limited to, Section 502 of the Department of Energy Organization Act, 42 U.S.C. § 7192; 28 U.S.C. §§ 1331, 1391 and 1651; and 5 U.S.C. §§ 704 and 706.

[2] Per the instructions of the DOE ("Parties requesting rehearing under FPA section 313 are not required to serve the

TWS, NRDC, Forest Guardians, and WRA filed comments with DOE relating to both NIETCs on July 6, 2007, and thus have party status for purposes of rehearing in accordance with DOE's Order. *See* 72 Fed. Reg. at 57026 (Ordering Paras. C, D). CWC is also an interested and affected party, as discussed below. The Parties incorporate by reference, consistent with 18 C.F.R. § 385.203(a)(2),[3] all evidence (including attachments) and arguments presented in *Comments of The Wilderness Society, et al.*, regarding DOE's Draft NIETC designations for the Southwest Area National Corridor and the Mid-Atlantic Area National Corridor, 72 Fed. Reg. 25838 (Dep't of Energy May 7, 2007), Document No. 81185 (filed July 6, 2007) (hereinafter "TWS Comments"), *Comments of Southern Environmental Law Center, et al.*, regarding DOE's Draft NIETC designations for the Southwest Area National Corridor and the Mid-Atlantic Area National Corridor, Document No. 81310 (filed July 6, 2007) (hereinafter "SELC Comments"), *Comments of National Wildlife Federation* regarding DOE's Draft NIETC designations for the Southwest Area National Corridor and the Mid-Atlantic Area National Corridor, Document No. 80901 (filed July 3, 2007), *Comments of the National Trust for Historic Preservation* regarding DOE's Draft NIETC designations for the Southwest Area National Corridor and the Mid-Atlantic Area National Corridor, Document No. 81315 (filed July 6, 2007), and *Comments of The Wilderness Society, et al.*, regarding DOE's Notice of Availability of the National Electric Transmission Congestion Study and Request for Comments, 71 Fed. Reg. 45047 (Dep't of Energy Aug. 8, 2006), Document No. 412 (filed Oct. 10, 2006).

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rehearing request on the parties to Docket Nos. 2007-OE-01 and 2007-OE-02. All rehearing requests are posted at this site.") , we are not serving this Application on other interested parties *See* http://nietc.anl.gov/rehearing/index.cfm

[3] DOE has never promulgated regulations governing applications for rehearing or motions to stay in the present context. DOE counsel confirmed this regulatory gap in a November 1, 2007 telephone conversation. Nevertheless, DOE counsel suggested that applicants for rehearing might refer to the Federal Energy Regulatory Commission ("FERC") procedural regulations, promulgated at 18 C.F.R. Part 385, as a guide. Although the Part 385 regulations apply, on their face, only to FERC proceedings arising under Title 18 of the United States Code and certain oil pipeline proceedings, *see* 18 C.F.R. § 385.101, the Parties have referred to those regulations for non-binding guidance in preparing and filing this Application and Motion.

For the reasons set forth below, the Parties request that DOE:

1. Consistent with 16 U.S.C. § 825*l*(c), 18 C.F.R. § 385.713(c), and 5 U.S.C. § 705, enter an immediate stay of its Order pending both rehearing, if any, and judicial review of the Order; and
2. Within 30 days of filing of this Application and Motion, either deny rehearing or grant rehearing and issue a ruling on the merits of the Order that is final for purposes of judicial review under 16 U.S.C. § 825*l*(b).

In the event that DOE grants rehearing of the Order and also fails to issue a ruling on the merits that is final for purposes of judicial review within 30 days, the Parties request an opportunity for oral hearing, consistent with 18 C.F.R. § 385.801.

The Parties reserve the right, consistent with 18 C.F.R. § 385.215, to supplement or otherwise amend this Application and Motion.

PARTIES

The Wilderness Society ("TWS"), founded in 1935, works to protect America's wilderness and wildlife and to develop a nationwide network of wild lands through public education, scientific analysis and advocacy. TWS's goal is to ensure that future generations will enjoy the clean air and water, wildlife, beauty and opportunities for recreation and renewal that pristine forests, rivers, deserts and mountains provide. TWS has a substantial interest in this process as it encompasses significant amounts of our nation's wildlands, wildlife habitat and other places that have been deemed in need of protective management.

The Natural Resources Defense Council, Inc. ("NRDC") is a nonprofit environmental organization with over 650,000 members nationwide and offices in New York, Washington, D.C., Chicago, San Francisco, Santa Monica, and Beijing, China. NRDC uses law, science, and

the support of its members and others in the public to protect public lands and wildlife; promote energy conservation and the development of cleaner and more sustainable sources of electricity; and ensure a safe and healthy environment for all living things. NRDC has worked to protect public lands and to promote energy conservation and sustainable energy for many years, engaging in state and federal legislative advocacy, administrative proceedings, and litigation, among other activities.

Forest Guardians is a southwest regional conservation organization with 3,500 members, whose mission is to protect and restore wildlands and wildlife in the American southwest through fundamental reform of public policies and practices. Forest Guardians advocates energy policies that prioritize renewable energy, energy use reduction, and curtailed extraction and use of fossil fuels. Forest Guardians has filed numerous challenges to oil and gas leasing and well permitting in areas that threaten native biodiversity, and has a significant interest in the designation of related transmission facilities.

Founded in 1989, Western Resources Advocates (WRA) is a non-profit environmental law and policy organization dedicated to restoring and protecting the land, air, water and wildlife resources within the interior Western United States. Specifically, our team of lawyers, scientists and economists works to: 1) promote a clean energy future for the Interior West that reduces pollution and the threat of global warming; 2) restore degraded river systems and to encourage urban water providers to use existing water supplies more efficiently; 3) protect public lands and wildlife throughout the region. WRA is actively engaged in promoting sound electric transmission policies in the western United States to ensure that: (1) power lines and associated rights-of-way/corridors are sited and constructed properly to ensure protection for sensitive land, water and wildlife resources; and (2) new transmission lines are focused on bringing renewable

energy sources like wind, solar and geothermal on line so that we may achieve a balanced and sustained energy policy in the region. The final designation of the NIETCs directly and negatively impacts WRA's transmission planning goals and efforts as detailed below.

The California Wilderness Coalition (CWC)defends the pristine landscapes that make California unique and provide clean air and water, a home to wildlife, and a place for recreation and spiritual renewal. CWC is the only organization dedicated to protecting California's wild places and native biodiversity on a statewide level. Through advocacy and public education, CWC builds support for threatened wild places, from oak woodlands to ancient forests and deserts, many of which are put at risk by the designation of the Southwest NIETC.

STATEMENT OF ISSUES

Consistent with 18 C.F.R. §§ 385.203 and 385.713(c)(2), the Parties identify the following issues raised in this Application:

1. Whether DOE erred in making the designations of the Southwest Area NIETC and the Mid-Atlantic NIETC immediately effective and should issue an immediate stay of the Order consistent with 16 U.S.C. § 825*l*(c), 18 C.F.R. § 385.713(c), and 5 U.S.C. § 705. The designations are already affecting ongoing transmission siting decisions pending before state regulatory authorities. For instance, San Diego Gas & Electric specifically identified its desire to use much of the proposed Southwest Area NIETC for current projects and has publicly stated that it is considering using the permitting process available to projects in NIETCs to override denials of these projects by state authorities. Similarly, within the Mid-Atlantic NIETC, PJM Interconnection supported designation to permit approval of specific projects. Further, as discussed in detail below, prior to making the designations effective, DOE must comply with applicable provisions of the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the National Historic Preservation Act ("NHPA"), and the Energy Policy Act of 2005 ("EPAct"). The designations will have significant, adverse impacts on the quality of the human environment, state and federally protected species, and historic and culturally significant properties, among other resources. Section 313 of the Federal Power Act ("FPA"), referenced by DOE in its Order, provides DOE with the discretion to "abrogate or modify" its Order or "at any time" to "modify or set aside, in whole or in part" its Order, as well as to issue a specific order to stay the effect of this designation pending resolution of this Application for Rehearing and subsequent judicial action, if any. 42 U.S.C. § 825*l*(a), (c).

2. Whether DOE violated NEPA, 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act ("APA"), by:
    a. Failing to conduct any analysis of environmental consequences under NEPA (42 U.S.C. § 4332(C));
    b. Failing to prepare a comprehensive environmental impact statement for the designation of the Southwest Area NIETC (42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.8, 1502.4);
    c. Failing to prepare a comprehensive environmental impact statement of the designation of the Mid-Atlantic Area NIETC (42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.8, 1502.4);
    d. Failing to conduct a thorough analysis of the direct, indirect and cumulative impacts, including connected and similar actions, of designation of the Southwest and Mid-Atlantic NIETCs on the human environment (40 C.F.R. § 1508.7);
    e. Failing to consider a reasonable range of alternatives under NEPA, including excluding places identified for protection by federal or state law and places containing sensitive resources from designation, identifying sources of electricity and designating NIETCs to improve access to renewable energy sources, and implementing opportunities to address congestion through improving efficiency of existing infrastructure, as well as through energy conservation, demand-side management, or distributed generation opportunities (40 C.F.R. §§ 1502.14(a), 1508.25(c));

3. Whether DOE violated the Endangered Species Act, 7 U.S.C. § 136, 16 U.S.C. § 1531 *et seq.*, and the APA by failing to consult with the U.S. Fish and Wildlife Service before designating the Southwest Area NIETC and the Mid-Atlantic NIETC, which may affect species listed under the Act (16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a);

4. Whether DOE violated the NHPA, 16 U.S.C. § 470 *et seq.*, and the APA by failing to take into account the effects of its undertakings in designating the Southwest Area NIETC and the Mid-Atlantic NIETC on historic properties (36 C.F.R § 800.1);

5. Whether DOE violated Section 1221 of EPAct by:
    a. Failing to respond and give serious consideration to public comments, despite Section 1221's requirement that DOE designate NIETCs only "[a]fter considering alternatives and recommendations from interested parties";
    b. Failing to adequately consult with states when designating the Southwest Area NIETC and the Mid-Atlantic Area NIETC despite the explicit requirement in Section 1221;
    c. Designating the Southwest Area NIETC and the Mid-Atlantic Area NIETC as "corridors," in contravention of the plain meaning of the term;
    d. Designating the Southwest Area NIETC and the Mid-Atlantic Area NIETC without considering alternatives despite the explicit requirement in Section 1221.

6. Whether DOE failed to provide for consistency of designating the Southwest Area NIETC and the Mid-Atlantic NIETCs with applicable federal land use plans (*See, e.g.*, Federal Land Policy and Management Act, 43 U.S.C. §§ 1712(a), 1732(a); National

Forest Management Act, 16 U.S.C. § 1604(a), (c); National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd); and

7. Whether DOE failed to make adequate provision for complying with state and federal commitments to maximize use of renewable energy sources when designating the Southwest Area NIETC and the Mid-Atlantic Area NIETC. *See, e.g.*, "BLM Launches Effort to Facilitate Renewable Energy Development on Public Lands (http://www.blm.gov/wo/st/en/info/newsroom/2007/june/NR_0706_1.html); BLM Instruction Memorandum No. 2006-216; state renewable portfolio standards http://www.eere.energy.gov/states/maps/renewable_portfolio_states.cfm).

SPECIFICATION OF ERRORS

Consistent with 18 C.F.R. § 385.713(c)(1), the Parties submit that DOE erred in designating the Southwest NIETC and the Mid-Atlantic NIETC by:

1. Making the designations of the Southwest Area NIETC and the Mid-Atlantic Area NIETC immediately effective, despite failures to comply with applicable laws and the ongoing transmission siting cases that will be affected by the designations;

2. Arbitrarily and capriciously asserting that the agency is not required to complete an analysis of environmental consequences under NEPA of the designation of the Southwest and Mid-Atlantic NIETCs and, consequently, failing to: prepare a comprehensive environmental impact statement ("EIS") for each designation; analyze the direct, indirect and cumulative impacts, including connected and similar actions, of each designation; consider a reasonable range of alternatives, including excluding certain special or sensitive areas, considering alternatives to new transmission; and prioritizing access for renewable energy sources;

3. Failing to comply with the consultation requirements of Section 7 of the ESA;

4. Failing to comply with the consultation requirements of Section 106 of the NHPA;

5. Failing to comply with Section 1221 of EPAct by: not responding and giving serious consideration to public comments; failing to meaningfully consult with states; categorizing the NIETCs as "corridors"; and failing to consider alternatives;

6. Failing to provide for consistency of designating the Southwest Area NIETC and the Mid-Atlantic NIETC with applicable federal land use plans; and

7. Failing to make adequate provision for complying with state and federal commitments to maximize use of renewable energy sources when designating the Southwest Area NIETC and the Mid-Atlantic Area NIETC.

GROUNDS FOR REHEARING

DOE should set aside its Order designating the Southwest and Mid-Atlantic NIETCs because the designations were made in violation of federal statutes including NEPA, the ESA, the NHPA, and Section 1221 of the EPAct.[4] In establishing a new and fast-track process for the siting of transmission lines across close to 45 million acres of the American landscape, DOE blatantly ignored the impacts of this action on, *inter alia*, over 499 protected or rare species and their habitats, over 3 million acres of National Parks, 2 million acres of National Wildlife Refuges, and thousands of acres of citizen-owned wilderness, open-space, and historic landmarks.[5]

DOE's failure to satisfy its statutory obligation to consider these impacts has grave consequences. DOE's NIETC designations constituted DOE's *sole* opportunity, under Section 1221(a) of the EPAct, to analyze the impacts of these actions over the entirety of lands that fall within the NIETCs or may be affected by them. 16 U.S.C. § 824p(a). Construction permitting authority within NIETCs is vested with the Federal Energy Regulatory Commission ("FERC"), a separate federal agency, under Section 1221(b) of the EPAct. And although Section 1221(h) of the EPAct designates DOE the "lead agency" for purposes of coordinating federal environmental reviews of facility sitings, 16 U.S.C. § 824p(h)(1)(2), DOE has already attempted to administratively delegate certain responsibilities under Section 1221(h) to FERC. *See*

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[4] Section 1221 of the EPAct, codified at 16 U.S.C. § 824p, added a new Section 216 to the FPA. 72 Fed. Reg. at 56992. References to "Section 1221" in this Application and Motion are to Section 1221 of the EPAct.

[5] In urging DOE to further examine its proposed NIETCs, the National Park Service commented, "The routing of new transmission power lines in newly untouched areas of Virginia's Valley and rural areas of Maryland is insane. This power line corridor, if built, will destroy numerous significant Civil War Battlefield viewsheds as well as several battlefield areas, where already hundreds of thousands, if not millions of dollars have been spent to preserve and protect these historic landscapes for future generations. Please consider other options. Thank you." Email from Eric Martin, National Park Service to DOE, Document No. 80292 (May 20, 2007).

Department of Energy Delegation Order No. 00-004.00A to the Federal Energy Regulatory Commission (May 16, 2006), *available at* http://www.directives.doe.gov/pdfs/sdoa/00-004_00A.pdf, at p. 4, para. 1.22.

In fact, because of its singular role as the agency charged with designating NIETCs under Section 1221(a), DOE is the only agency empowered to consider the cumulative impacts of the designation of transmission siting corridors across the large swaths of land in the Southwest and Mid-Atlantic NIETC. Because the statutory structure vests FERC with permitting authority under Section 1221(b), no subsequent process under federal or state law will consider the cumulative impacts of the NIETC designations for electric transmission line siting on the entire area within each corridor or corridors.

I. DOE Violated NEPA, the ESA, and The NHPA in Designating The NIETCs

In designating the NIETCs, DOE authorized significant adverse impacts on the quality of the human environment, state and federally protected species, and historic and culturally significant properties, among other resources, without the comprehensive, prospective analysis of these impacts mandated by NEPA, the ESA, and the NHPA.

A. DOE violated NEPA in designating the NIETCs

NEPA, 42 U.S.C. § 4321 *et seq.*, requires all federal agencies "to the fullest extent possible" to interpret and administer all laws in ways that implement the policy of serving as trustee of the environment for present and future generations. The provisions of NEPA were intended to help public officials make decisions with an "understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(a). NEPA requires agencies to take a pre-decisional "hard look" at the risk, uncertainty, and potential environmental consequences of proposed federal actions. *See*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989). NEPA requires federal agencies to assess the direct, indirect and cumulative environmental impacts of proposed actions, notably defining cumulative impacts as including "the impact on the environment which results from the incremental impact of the action *when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions*." 40 C.F.R. § 1508.7 (emphasis added).

The direct, indirect and cumulative impacts of DOE's designation of these NIETCs pose serious environmental consequences considering that the action facilitated the siting and construction of anticipated transmission lines across millions of acres, with correspondingly substantial impacts likely to occur. The Southwest NIETC alone comprises close to 45 million acres, encompassing more than 1.5 million acres of National Parks, over 1.5 million acres of National Wildlife Refuges, and millions of acres of citizen-owned wilderness and open-space. The actions threaten, *inter alia*, over 499 protected or rare species and their habitats. The environmental impacts posed by these NIETCs include, *inter alia*, large-scale habitat destruction and fragmentation, increases in greenhouse gas emissions, increased air pollution, introduction of invasive species, increased avian mortality, and decreased water quality. These are precisely the types of potential environmental consequences and risks or uncertainties that NEPA requires agencies to take a "hard look" at before issuing final decisions.

DOE acknowledges that NEPA requires all agencies to prepare an environmental impact statement ("EIS") for major federal actions significantly affecting the human environment. 42 U.S.C. § 4332(2)(C). DOE claims that no NEPA analysis is required for the proposed designation, however, on the grounds that there is no federal action significantly affecting the human environment. DOE suggests that its designations do not mandate the construction of any

particular transmission line or construction proposal within the NIETCs, and thus neither endorse transmission options nor foreclose other options for addressing congestion, including non-transmission options. *See, e.g.*, 72 Fed. Reg. at 5994. However, because the NIETC designations are a formal change in federal policy, the implementation of which will change the manner in which interstate transmission projects are approved by federal and state agencies, their effects must be considered in a comprehensive EIS, such as a programmatic EIS. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). It is only by completing a programmatic EIS or EIS of comparable scope that DOE will be able to examine "an entire policy initiative rather than performing a piecemeal analysis." *Northcoast Environmental Center v. Glickman*, 136 F.3d 660, 688 (9th Cir. 1998). Further, as discussed below and contrary to DOE's assertions, the NIETC designations facilitate some transmission options and disfavor or foreclose others, leading to significant, immediate on-the-ground consequences.

Section 1221(j) of EPAct contemplates that NEPA will apply to the designation of NIETCs, stating: "Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*)." 16 U.S.C. § 824p(j)(1). Section 1221 provides no specific NEPA exemption for the designation of NIETCs, which is unsurprising in light of the obvious need for agency consideration of environmental consequences likely to result from designation.[6]

NEPA requires federal agencies to consider the direct, indirect and cumulative impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.

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[6] DOE's own NEPA regulations make clear that its designation of a NIETC is a type of action requiring an EIS. *See* 10 C.F.R. pt. 1021, subpt. D, app. D (listing "Allocation of electric power, major new generation resources/major changes in operation of generation resources/major loads"). DOE's designation of NIETCs is also far more substantial than any of the actions its regulations describe as appropriate for use of a categorical exemption. *See* 10 C.F.R. pt. 1021, subpt. D, app. B.

§ 4332(C). Major federal actions include: "new and continuing activities, including projects and *programs* entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; *new or revised agency rules*, regulations, plans, *policies, or procedures*; and legislative proposals." 40 C.F.R. § 1508.18(a) (emphasis added). Because designation of these NIETCs is a "major federal action" that significantly affects the "quality of the human environment, DOE was required to complete a NEPA analysis.

Federal regulations also require that "[a]gencies shall integrate the NEPA process with other planning at the *earliest possible time* to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2 (emphasis added); *see also Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979). Because DOE's designation of these NIETCs is that first step in the federal process for the expedited siting of interstate electric transmission facilities under Section 1221 of the EPAct, NEPA considerations are triggered at this stage. 16 U.S.C. § 824p(a). Notwithstanding the early stage in the process, the requirement for NEPA analysis by DOE is also compelled by the statutory text of Section 1221. In addition to providing no exception to environmental laws—including NEPA—Section 1221 mandates that "[t]he Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility." 16 U.S.C. § 824p(h)(2), (j)(1). DOE's purported administrative delegation of certain of those obligations to FERC, *see supra* pp. 7-8, does not relieve DOE of its fundamental NEPA duty to analyze the impacts of its NIETC designations under subsection (*a*) of Section 1221 at the earliest time possible, and before making the designations effective.

DOE, in its October 5, 2007 Order, describes its involvement in the process of siting interstate electric transmission facilities as limited to the congestion study and designation of national corridors. *See* 72 Fed. Reg. at 57022. By DOE's own representation, therefore, it will have limited to no opportunity to provide environmental review hereafter. Equally important, as discussed above, DOE's designation of these NIETCs constituted its sole opportunity to conduct a truly comprehensive, prospective analysis of impacts on all lands within or otherwise affected by the NIETCs. *See* 16 U.S.C. § 824p(a). Moreover, it is likely that no other federal or state agency will have a comparable future opportunity to consider these impacts in the context of the entire Southwest NIETC designation or Mid-Atlantic NIETC designation, because as DOE admits, subsequent processes will likely focus on individual permit applications to either states or FERC. *See supra* at 7; 16 U.S.C. § 824p; 72 Fed. Reg. at 57022. NEPA required DOE to consider the entirety of these impacts on all lands affected by either NIETC—including the impacts associated with the potential siting of several electric transmission lines through various federal and state jurisdictions—before making its designations. DOE erred in failing to complete a programmatic EIS or other NEPA analysis before designating the NIETCs.

1. DOE Failed to Prepare A Comprehensive EIS for The NIETC Designations

NEPA requires federal agencies to assess the direct, indirect and cumulative environmental impacts of proposed actions, taking a "hard look" at environmental consequences and performing an analysis commensurate with the scale of the action at issue. *See* 40 C.F.R. § 1508.8. With respect to its NIETC designations, DOE is subjecting the lands within the Southwest and Mid-Atlantic NIETCs to a new approval policy and process, created by Section 1221 of EPAct. As a result, the NIETC designations have a compounded effect throughout the Southwest and Mid-Atlantic regions and these direct, indirect and cumulative effects must be

considered through a comprehensive EIS for each NIETC. By designating the NIETCs without preparing a comprehensive EIS for each NIETC, DOE has conducted the sort of "piecemeal analysis" prohibited by NEPA.

The scope of NEPA analysis must be sufficient to address the scope and scale of the proposed action. 40 C.F.R. § 1508.8. In this situation, the multi-state scale of the proposed designations and the many sensitive resources and special places that could be impacted require a substantial analysis in a comprehensive EIS. NEPA requires that the agency "prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking. 40 C.F.R. § 1502.4. In a comprehensive or programmatic document, DOE will be best able to address the manner of implementation of its NIETC designations so that it takes into account potential environmental consequences, suitable protective measures and the appropriate staging of projects.

In order to account for the implications of the new policy and procedures embodied in the NIETC process, DOE must prepare a separate comprehensive (and/or programmatic) EIS for the Southwest and Mid-Atlantic NIETCs, as well as for future proposed NIETC designations.

2. DOE Failed to Assess the Direct, Indirect, and Cumulative Effects of Its NIETC Designations

As noted above, DOE's response to concerns regarding the lack of NEPA or other environmental analysis is to claim that the analysis will be addressed on a project-by-project basis by FERC. *See, e.g.*, 72 Fed. Reg. at 57023. However, this deferral of analysis means that consideration of the cumulative impacts of each NIETC designation, pursuant to a new and significantly different regulatory scheme, will not be conducted. DOE's approach is a textbook example of deferring consideration and attempting to minimize environmental consequences (and avoid preparation of a comprehensive EIS) by segmenting proposed and reasonably

foreseeable development into smaller parts in violation of NEPA. As the Supreme Court has stated, where several proposals "will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (U.S. 1976). To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact, would provide a clear loophole to NEPA. *Scientists' Inst. for Pub. Information, Inc. v. AEC*, 481 F.2d 1079, 1086 n.29, 1086-89 (D.C. Cir. 1973) (holding that an EIS is required for an overall project where individual actions are related logically or geographically). "Segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action" violates NEPA. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 1980). The NIETC designations will have reasonably foreseeable consequences on the multi-state, regional scale of the proposed Southwest and Mid-Atlantic NIETCs. NEPA requires that cumulative effects analysis be conducted.

While DOE has some discretion in determining the scope of a NEPA document, there are situations where an agency *must* consider several related actions in a single NEPA document—including, in this situation, the potential projects already identified for the designated NIETCs. DOE must prepare a single EIS where proposed actions constitute "connected actions," "similar actions," or "cumulative actions" (*i.e.*, have cumulative effects—although note that though overlapping, the duty to prepare a single EIS is separate from the duty to assess, in the first place, cumulative effects). 40 CFR § 1508.25.

Connected actions include those that are "interdependent parts" of a larger action and "depend on the larger action for their justification." 40 CFR § 1508.25(a). One of the primary reasons for NEPA's requirement to evaluate "connected actions" in a single environmental document is "to prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact." *Citizens' Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002). In the Southwest and Mid-Atlantic NIETCs, the potential effects of large-scale construction of transmission projects are connected to the designations, even though DOE has chosen to separate them and defer analysis. At this time, although DOE does not know exactly how projects will be constructed in the NIETCs, there is a substantial likelihood that these projects will be developed and many of them are already under consideration by state or federal agencies, and/or have been identified in the comments that DOE has received as part of the NIETC designation process. DOE's segmented approach, as stated, obscures cumulative effects and precludes the consideration and, if necessary, adoption of management alternatives that transcend individual projects and take into account the other important resources in the NIETCs.

The NEPA regulations also define "similar" actions as those that "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25(a)(3). The regulations also provide that agencies ought to analyze such similar actions in a single impact statement when "the best way to assess adequately the combined impacts of similar actions or reasonable alternatives is to treat them in a single impact statement." *Id.* In relation to the many transmission projects identified for the Southwest and Mid-Atlantic NIETCs, their development will have similar features and will be

within defined areas –the proposed NIETCs. DOE's efforts to separate the industry's proposals from its NIETC designations ignore the likely effects of similar actions.

Further, as noted, there are numerous transmission projects already underway (and under consideration by state and/or federal agencies) that are likely to affect the need for additional projects and the degree to which lands within the Southwest and Mid-Atlantic NIETCs will be impacted by the development and approval of more transmission projects. Examples of ongoing transmission projects that will affect lands within the Southwest NIETC include the TransWest Express Project, Frontier Line, Southwest Intertie Project, and High Plains Express. These and other ongoing projects are part of the "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" that DOE must consider in performing its cumulative impact analysis of the NIETC designations. In order to remedy its error, DOE must conduct a thorough analysis of the cumulative effects of the Southwest and Mid-Atlantic NIETC designations, including the connected and similar actions of existing, proposed and anticipated transmission projects in these regions.

3. DOE Failed to Analyze Reasonable Alternatives to the NIETC Designations

The range of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. NEPA requires DOE to "[r]igorously explore and objectively evaluate" a range of alternatives to proposed federal actions. *See* 40 C.F.R. §§ 1502.14(a), 1508.25(c).

> NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decision-making and provides evidence that the mandated decision-making process has actually taken place. Informed and meaningful consideration of alternatives - including the no action alternative - is thus an integral part of the statutory scheme.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (citations and emphasis omitted).

"An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." *Northwest Envtl Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th Cir. 1997). An agency violates NEPA by failing to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9th Cir. 1990) (quoting 40 C.F.R. § 1502.14). This evaluation extends to considering more environmentally protective alternatives and mitigation measures. *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,1122-1123 (9th Cir. 2002) (and cases cited therein); *see also Or. Envtl. Council v. Kunzman,* 614 F.Supp. 657, 659-660 (D. Or. 1985) (stating that the alternatives that must be considered under NEPA are those that would "avoid or minimize" adverse environmental effects).

NEPA requires that an actual "range" of alternatives is considered, such that the Act will "preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished be only one alternative (*i.e.*, the applicant's proposed project)." *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999), citing *Simmons v. United States Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997). This requirement prevents the EIS from becoming a foreordained formality." *City of New York v. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983); *see also Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). In its approach to designating the Southwest and Mid-Atlantic NIETCs, DOE has strictly limited the alternatives considered, summarizing its actions as limited to considering other congestion or constraints, alternative boundaries, or not designating a NIETC. *See* 72 Fed. Reg. at 57010, 57018. The DOE's analysis is inadequate.

a. DOE Failed to Conduct a NEPA Analysis that Considered Special and Sensitive Lands in The Southwest NIETC

DOE has ignored the likelihood that the NIETCs are likely to damage places designated for protection based on their special values and refused to consider alternatives to protect special and sensitive lands by excluding them from the NIETC designations. In the Southwest NIETC, these places include the Kofa National Wildlife Refuge (crossed by the proposed Devers-Palo Verde 2 line) and Sonoran Desert National Monument in Arizona, and Joshua Tree National Park and Carrizo Plain National Monument in California. As shown by an analysis conducted by The Wilderness Society (provided with TWS Comments), on federal lands the Southwest NIETC encompasses:

- nearly 45 million acres of total area (federal, state and private);
- more than 1.5 million acres of National Wildlife Refuges and over 1.5 million acres of National Parks (including more than 2 million acres of designated Wilderness);
- Units of the Bureau of Land Management's (BLM) National Landscape Conservation System, including approximately 750,000 acres of BLM National Monuments and 21 million acres of the California Desert Conservation Area. These areas also include more than 2.8 million acres of Wilderness;
- an additional 772,000 acres of Forest Service and BLM Wilderness outside of the National Wildlife Refuges, National Parks, National Conservation Areas, and National Monuments; and
- more than 1.5 million acres of citizen-proposed wilderness (all agency lands).

The proposed Southwest NIETC also encompasses protected state lands, including:

- in California: 57 State Beaches, State Parks, State Reserves, State Historic Parks and State Recreation Areas (a comprehensive list is provided as Attachment 7 to TWS Comments); and
- in Arizona: State Parks, including Picacho Peak State Park, and State Historic Parks, including Tubac Presidio State Historic Park (*See*, Map of Arizona State Parks, attached to TWS Comments).

Looking just at the proposed Sunrise Powerlink, for example, the proposed location goes through Anza Borrego Desert State Park, borders or impacts Wilderness Areas, WSAs and Areas of Critical Environmental Concern on federal lands, crosses numerous Open Space areas and

impacts many other protected and sensitive wildlife areas. (*See* Map showing Sunrise Powerlink and Protected Natural Lands, attached to TWS Comments).

b. DOE Failed to Conduct a NEPA Analysis that Considered Special and Sensitive Lands in the Mid-Atlantic NIETC

The proposed Mid-Atlantic NIETC could have similar impacts on places of special concern to the public, such as the Canaan Valley National Wildlife Refuge and the Spruce Knob/Seneca Rocks National Recreation Area in West Virginia; Patuxent National Research Refuge in Maryland; Cape May National Wildlife Refuge in New Jersey; and Oyster Bay National Wildlife Refuge in New York. The proposed Mid-Atlantic NIETC encompasses:

- 39 National Wildlife Refuges (identified on Attachment 10 to TWS Comments);
- all or part of 4 National Forests (rare in the east);
- more than one million acres in the Pinelands National Reserve (a/k/a the Pine Barrens) in NJ, the nation's first national (biosphere) reserve;
- the federally-recognized Highlands Region of PA, NY, NJ and CT constituting more than 3 million acres;
- innumerable units of the National Park System, including National Battlefields, Parkways, Cemeteries, National Seashores, Historic Sites, Scenic Trails and Parks, such as Antietam National Battlefield in MD and the Delaware Water Gap NRA in NJ;
- thousands of acres of inventoried roadless areas in the National Forest System, including Roaring Plains, Gauley Mountain and Smoke Hole Canyon on the Monongahela National Forest; and
- tens of thousands of acres of citizen-proposed wilderness (all agency lands).

The proposed Mid-Atlantic NIETC also encompasses protected state lands, including:

- in West Virginia, Coopers Rock, Seneca and Kumbrabow State Forests, Blackwater Falls, Cathedral, and Canaan Valley State Parks;
- in Delaware, 15 State Parks including Brandywine Creek and Killens Pond State Parks; and
- in Pennsylvania, numerous State Parks including Gifford Pinchot, Delaware Canal and Ohiopyle State Parks.

DOE concedes that these special places are not excluded from the corridor designations, stating: "In determining the boundaries of the two proposed National Corridors, DOE did not carve out environmentally sensitive lands because the statute does not exclude such lands from inclusion in a National Corridor." DOE, National Electric Transmission Congestion Report and

Final National Corridor Designations, Frequently Asked Questions (October 2, 2007), *available at* http://nietc.anl.gov/documents/docs/FAQs_re_National_Corridors_10_02_07.pdf (hereinafter "DOE Frequently Asked Questions") at 4. DOE claims that such concerns will be addressed later when FERC conducts a "review under the National Environmental Protection Act [sic]." This is not sufficient protection for these areas; nor is it a sufficient answer to the question at issue, especially since Section 1221 of the EPAct provides for FERC to override a state's decision to protect its park lands, wildlife refuges or other lands that it values, such as open space, and for appeals of federal agencies' decisions to deny permits on their lands. DOE can exempt the categories of special places identified above, as well as locations that will interfere with citizens' enjoyment of these places (*e.g.*, by interfering with natural quiet or scenic vistas) from potential locations for siting transmission projects within the Southwest and Mid-Atlantic NIETCs.

c. DOE Failed to Conduct a NEPA Analysis that Considered Alternatives to New Transmission or Improving Access to Renewable Energy Sources.

DOE has not considered opportunities to address congestion through improving efficiency of existing infrastructure, as well as through energy conservation, demand-side management, or distributed generation opportunities. The agency has also not considered the potential sources of electricity (*i.e.*, coal versus wind)[7], and their respective impacts on the lands within the NIETCs. Given the amount of land included in the designated NIETCs and the scope

[7] Commenters have celebrated the opportunities that designation of these NIETCs will provide for increased use of coal for electricity generation. *See, e.g.,* Comments of Bay Area Municipal Transmission Group, DOE Compilation of comments, p. 76; Comments of PJM Interconnection, LLC, DOE Compilation of comments, at 442, 451. From strip mining to toxic air emissions, water pollution and production of greenhouse gases, the conventional coal fuel cycle is among the most environmentally destructive activities on earth. *See, e.g.,* NRDC, "Coal in a Changing Climate" (Feb. 2007), http://www.nrdc.org/globalWarming/coal/contents.asp . DOE has begun to assess potential renewable generation resources in the areas within the proposed NIETCs. *See, e.g.,* App. B, http://nietc.anl.gov/documents/docs/AppendixB.pdf. NEPA requires that these impacts be considered by DOE in a full EIS prior to designating these corridors.

of development contemplated by both DOE and industry, there is a wide range of alternatives that can and should be considered.

In order to remedy its error, DOE must consider a range of alternatives before designating the Southwest and Mid-Atlantic NIETCs, including protection of special and sensitive places, non-transmission alternatives to addressing congestion, improving access to transmission for renewable energy sources and improving the efficiency of existing infrastructure, and not limiting consideration to simply designation of these large areas.

4. DOE Has Already Conceded that a Programmatic EIS is Required for Similar Transmission Corridor Designations Under the Energy Policy Act

Following the statute and the regulations, *DOE has already conceded, with regard to corridors designated under Section 368 of the EPAct, that a Programmatic EIS is required.* As explained on the "West-wide Energy Corridor Programmatic EIS Information Center" website:

> The Agencies [DOE, the Department of the Interior, the Bureau of Land Management, the Forest Service, and the Department of Defense] have determined that designating corridors as required by Section 368 of the Act constitutes a major federal action which may have a significant impact upon the environment within the meaning of the National Environmental Policy Act of 1969 (NEPA).

See website for West-wide Energy Corridor Programmatic EIS Information Center *at* http://corridoreis.anl.gov/index.cfm. The Agencies further explain that designating corridors triggers NEPA requirements *before* any application for the siting or construction of new transmission lines, or other structures, has been received. Rather, the programmatic EIS is required because the corridor designations:

> will facilitate processing of anticipated right-of-way applications. Therefore, the proposed action will define and implement a program that sets the stage for potential site-specific actions. The proposed action is also policy-setting because it will establish energy distribution as the most appropriate use of the designated corridors.

See "Why the West-wide Energy Corridor Programmatic EIS Is Needed" *at* http://corridoreis.anl.gov/eis/why/index.cfm. All of these observations are fully applicable to the Mid-Atlantic Area and Southwest Area Corridor designations. The corridor designations clearly "set the stage for potential site-specific actions." *Id.* Moreover, the designations are "policy-setting" because they set in place a fast-track process for permitting high-voltage transmission lines. As such, they "establish energy distribution as the most appropriate use of the designated corridors." *Id.*

The agencies mentioned above, which include DOE, have recognized that "Nothing in the Energy Policy Act changes the requirements of environmental laws such as the Endangered Species Act, the National Historic Preservation Act, the Clean Water Act, and the Clean Air Act." *Id; see also* 16 U.S.C. § 824p(j). DOE's choice to simply designate two large swaths of land National Interest Electric Transmission "Corridors"—without reference to "shape, proportion, or size" or similar considerations—does not alleviate its obligation to comply with NEPA in making the designations. *See* 72 Fed. Reg. at 57006. NEPA mandates the consideration of environmental impacts for federal actions. 40 C.F.R. §§ 1500.1(a), 1508.7. In light of DOE's involvement in similar federal agency transmission siting decisions for which programmatic EIS's have been prepared, and Section 1221(j)'s express NEPA compliance mandate, DOE cannot fairly deny that it was required to prepare a programmatic EIS or similar document *before* designating the NIETCs.

5. DOE Failed to Conduct an Environmental Assessment or Properly Reach a Finding of No Significant Impact Before Designating the NIETCs.

The significant impacts of DOE's NIETC designations unquestionably triggered NEPA's requirement to prepare an EIS. In any case, even if DOE had properly determined that an EIS was not required—and it did not, DOE also failed to conduct an Environmental Assessment

("EA") or properly reach a Finding of No Significant Impact ("FONSI"). Instead of following NEPA's implementing regulations, DOE made the unsubstantiated statement that "National Corridor designations have no environmental impact." 72 Fed. Reg. at 57022.

If an agency does not know whether to prepare an EIS, NEPA requires it to first conduct an EA to review the potential for environmental impacts. *See* 40 C.F.R. § 1501.4(a)-(b). If, after completing the EA, the agency determines that there will be no environmental impact, then it is required to issue a FONSI. *See* 40 C.F.R. § 1501.4(e). DOE ignored these requirements. DOE failed to make the threshold NEPA assessment and findings, mandated by NEPA and DOE's NEPA regulations and explicitly provided for in Section 1221(j) of the EPAct, in its NIETC designation process. *See* 40 C.F.R. §§ 1501.4(a), (b), (e); 16 U.S.C. § 824p(j). This failure alone justifies a rehearing of DOE's Order.

B. DOE Violated The ESA in Designating The NIETCs

The Southwest and Mid-Atlantic NIETCs encompass critical and/or important habitat for threatened and endangered species, such as the desert tortoise and bighorn sheep in the Southwest NIETC and the West Virginia northern flying squirrel in the Mid-Atlantic NIETC. DOE should obtain from the U.S. Fish and Wildlife Service a list of threatened, endangered, proposed, candidate, and other special status species in order to assess the impacts of this project on those species. In addition, Forest Guardians has recently petitioned the U.S. Fish and Wildlife Service to list 475 southwestern species as threatened and endangered (*see* http://www.fguardians.org/library/paper.asp?nMode=2&nLibraryID=503), highlighting the importance of the wildlife habitat in the Southwest NIETC. As shown above, the designation of

these NIETCs will have foreseeable harmful impacts on the wildlife and plant habitat within the Southwest and Mid-Atlantic regions.[8]

Congress enacted the Endangered Species Act (ESA) as "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). As the Supreme Court observed, the statute "afford[s] endangered species the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 194 (1978). To achieve its objectives, Congress directed FWS to list species that are "threatened" or "endangered," as defined by the ESA. 16 U.S.C. § 1533; § 1532(6), (20).

Once a species is listed, Section 7 of the ESA mandates that every federal agency "consult" with FWS when taking any action that "may affect" listed species." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 790 (9th Cir. 2005). The purpose of the Section 7 consultation process is to insure that no agency actions "jeopardize the continued existence" of a listed species. *Id.* To facilitate the consultation process, the "action agency" prepares a "biological assessment," which identifies the listed species in the action area and evaluates the proposed action's effect on the species. *Id.* § 1536(c); 50 C.F.R. §§ 402.02, 402.12. Through a biological assessment, the agency determines whether formal or informal consultation is necessary. 50 C.F.R. § 402.13(a). When formal consultation is necessary, FWS prepares a "biological opinion" that determines whether the agency's action will result in jeopardy to the species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g). If there is jeopardy, FWS sets for "reasonable and prudent alternatives" aimed at

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[8] According to data from the U.S. Fish and Wildlife Service's Threatened and Endangered Species System, there are at least 499 protected or at-risk species within the jurisdiction of the Southwest and Mid-Atlantic NIETC. *See* SELC Comments at 8 and Ex. B. There are at least 87 federally-listed animal species and 63 federally-listed plant species and their habitats that may be potentially impacted by the NIETC designation—including *inter alia*, the desert tortoise, gray wolf, tidewater goby, southern steelhead, California red-legged frog, and Western snowy plover. *See* NWF Comments, attach. 25 and 26.

avoiding jeopardy. 16 U.S.C. § 1536(b)(3)(A). If there is no jeopardy, FWS identifies the reasonable and prudent mitigation measures. *Id.* § 1536(b)(4).

The ESA defines agency action broadly. 16 U.S.C. § 1536(a)(2); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992). It includes "*all* activities or programs *of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (emphasis added). Agency actions include those "actions directly or indirectly causing modifications to the land, water, or air." *Id.* § 402.02. DOE's designations of the Southwest and Mid-Atlantic NIETCs constituted agency actions within the meaning of the ESA.

By designating NIETCs without taking steps to consider potential adverse effects to protected species and to incorporate appropriate limitations on potential projects, DOE is failing to comply with the mandates of the ESA to ensure that its actions are "not likely to jeopardize the continued existence of any endangered or threatened species." 16 U.S.C. § 1536(a)(2). In fact, DOE's designations of the Southwest and Mid-Atlantic NIETCs are likely to jeopardize the continued existing of many endangered or threatened species.

Moreover, all federal agencies are obligated to conserve listed species by "carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Under the ESA, "conserve" is defined as recovering a species. Therefore, DOE is not only obligated to avoid jeopardizing the survival and recovery of listed species, but is also required to take steps within its purview to recover these species. 16 U.S.C. § 1532(3) (definition of "conserve").

In order to remedy this error, DOE must engage in the Section 7 consultation process directed by the ESA to determine the effects of its NIETC designations on the endangered and threatened species—and then make necessary adjustments to the designations. In order to

comply with the ESA, DOE must prepare biological assessments for the designation of the Southwest and Mid-Atlantic NIETCs, engage in formal consultation with the U.S. Fish & Wildlife Service, and identify and incorporate appropriate alternatives and/or mitigation measures in connection with each corridor. *See* 16 U.S.C. § 1536(c)(1), 1536(a)(2); 50 C.F.R. §§ 402.12(k)(1), 402.14(a). DOE also must carry out programs to conserve listed species in the action area. *See* 16 U.S.C. § 1536(a)(1).

Until DOE completes the consultation process mandated by Section 7(d) of the ESA, it may not lawfully designate NIETCs or otherwise commit agency resources under Section 1221 of the EPAct. *See NRDC v. Houston*, 146 F.3d 1118, 1127-28 & n.6 (9th Cir. 1998) (agency action that commits resources before agency completes ESA Section 7(d) consultation violates the ESA). That DOE has not begun, let alone completed, this consultation is grounds for rehearing.

C. DOE Violated The NHPA in Designating The NIETCs

Section 106 of the National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. §§ 470 *et seq*., requires federal agencies to take into account the effects of their undertakings on historic properties. 16 U.S.C. § 470f ; 36 CFR § 800.1. The definition of "undertaking" is:

> Undertaking means a project, activity, or program **funded in whole or in part** under the **direct or indirect jurisdiction of a Federal agency**, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

36 CFR § 800.16(y) (emphasis added). DOE is designating NIETCs under the authority of a new federal process created under the EPAct, meeting this definition.[9]

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[9] In addition, the discussion above regarding the need for NEPA compliance in designating NIETCs provides further support for the requirement to comply with the NHPA, since precedent finds the standards comparable. *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1992); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1484 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (an "undertaking" under the NHPA is comparable to a "major federal action" under NEPA); *Sugarloaf Citizens Ass'n. v. FERC,* 959 F.2d 508,

Further, the NHPA requires consultation where an action has even the "potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). Procedural changes have been determined to be undertakings with the potential to cause effects to historic properties, thereby triggering Section 106 compliance. *See Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1257 (D.C. Cir. 1988). Procedural changes may have adverse effects if they have the potential to "alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, . . . setting, . . . feeling, or association." 36 C.F.R. § 800.5(a)(1). Adverse effects can also include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." *Id.* The NIETC designations incorporate numerous National Historic Landmarks, National Heritage Areas, National Monuments, civil war battlefields, National Register properties and districts, significant historic landscapes, and state and local historic properties. *See, e.g.,* Northeast Region, National Park Service, Map of Draft Mid-Atlantic NIETC with Park Service Resources (Attachment B to Comments of National Trust for Historic Preservation (July 6, 2007)); *see also* TWS Comments, Attachments No. 3-9 (July 6, 2007. The Section 106 review process obligates DOE to consider the effects of management actions on historic and cultural resources listed or eligible for inclusion under the NHPA, encompassing even more properties.[10] The NHPA stipulates that consultation among agency official(s) and other parties with an interest in the

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515 (4th Cir. 1992) (the threshold "standard for triggering NHPA requirements is similar to that for the triggering of NEPA requirements."); *Ringsred v. Duluth,* 828 F.2d 1305, 1309 (8th Cir. 1987) (acknowledging "NHPA's 'undertaking' requirement as essentially coterminous with NEPA's 'major Federal actions' requirement").

[10] The NIETC designations also threatens historic districts, sites, buildings, structures and objects that are included or eligible to be included in the National Register, including, *inter alia*, 21,725 acres of Civil Water Battlefields and 37 historic sites in Virginia alone. Letter from Cale Jaffe, Southern Environmental Law Center, to Kevin Kolevar, DOE at 12 (July 6, 2007); *see* Email from Eric Martin, National Park Service to DOE (May 20, 2007) (discussing need to "preserve and protect [] historic landscapes for future generations).

effects of the undertaking on historic properties commence at the early stages of project planning, focusing on the opportunity to consider a broad range of alternatives. 36 C.F.R. § 800.1(c). Compliance with Section 106 is applicable "at any stage where the Federal agency has authority . . . to provide meaningful review of . . . historic preservation goals." *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983) (emphasis added); *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1444-45 (5th Cir. 1991). Therefore, DOE cannot rely on FERC's later review process as a justification for refusing to comply with the NHPA.

Clearly, Section 106 consultation must be conducted before a decision on the location of transmission corridors (however broad) is made. The Federal Advisory Council on Historic Preservation (Advisory Council), the independent federal agency charged by Congress with implementing and enforcing agency compliance with Section 106, has recommended on several occasions that DOE initiate the Section 106 process prior to designating NIETCs.[11]

To satisfy the Section 106 compliance requirement, the Responsible Agency Official must consult with the State Historic Preservation Officer(s) (SHPO), and appropriate Tribes and/or Tribal Historic Preservation Officer(s) (THPO). DOE's present NIETC designation process has also denied SHPOs and THPOs their required right to consultation; designation has occurred before the required consultation process has even began. This must be rectified. Additionally, Section 106 requires DOE to give the Advisory Council on Historic Preservation (ACHP) an opportunity to comment before DOE takes action, such as designating NIETCs. The

[11] On October 10, 2006, John Fowler, Executive Director of the Advisory Council, expressed his concern about the NIETC program "[b]ecause designation of an [NIETC] could significantly limit the opportunity to avoid or minimize adverse effects to historic properties." Letter from John Fowler to Secretary Bodman at 2 (Oct. 10, 2006). The Advisory Council "strongly recommend[ed] that the DOE not postpone the consideration of effects to historic properties until after a [NIETC] has been designated, but conduct a two-tiered review under the ACHP's regulations." *Id.* at 2. On January 10, 2007, the Advisory Council again recommended that DOE initiate Section 106 prior to NIETC designation. Letter from Fowler to Secretary Bodman at 2 (Jan. 10, 2007).

ACHP criteria for Council involvement as defined in Appendix A to Part 800 (36 C.F.R § 800) make it almost certain the Council will choose to participate in consultation.

Beyond the NHPA compliance and consultation requirements, the Responsible Agency Official must consult with, invite, and offer opportunities for federally recognized Indian Tribes to collaborate and participate in the planning process. This is to satisfy the necessary Government-to-Government consultation with Tribes stipulated under Executive Order 13175.

DOE must complete the Section 106 consultation process and has erred by designating NIETCs before doing so. The notice and comment function of this obligation is usually conducted concurrent with the notice and comment provisions of NEPA; DOE can fulfill the requirements of the NHPA in a joint process and then make appropriate changes to the designation of the Southwest and Mid-Atlantic NIETCs.

II. DOE Violated Section 1221 of the Energy Policy Act of 2005 ("EPAct") in Designating the NIETCs.

Section 1221 of EPAct sets out requirements for designation of National Interest Electric Transmission Corridors, but DOE has not compiled with these requirements.

A. DOE Violated Section 1221's Requirement to Engage In Meaningful Consideration of Public Comments and Concerns.

Section 1221 of EPAct requires DOE to designate NIETCs only "[a]fter considering alternatives and recommendations from interested parties." To date, the recommendations from "interested parties" that have been considered by DOE appear to be limited to those submitted by industry. The geographic boundaries of the proposed NIETCs correspond with and accommodate recommendations from industry for designation and proposed transmission projects submitted prior to distribution of the congestion and constraints study for public comment. Further, the "outreach" meetings conducted by DOE prior to issuing the study for

public comment were primarily limited to industry, with some also addressing potential regulators. *See* App. G, National Electric Transmission Congestion Study. The "interested parties" whose enjoyment of their public lands could be damaged and whose private property could be condemned were not provided a sufficient opportunity for comment. DOE has not actively sought public input and has not responded to public comments, while seeking and accommodating industry suggestions. This unbalanced approach to public input and considering recommendations does not fulfill the requirements of Section 1221 of EPAct.

DOE must provide an expanded opportunity for public input, respond to public comments and give serious consideration to concerns raised by individuals and groups not directly associated with the industry proposing new transmission projects; and then make appropriate adjustments to the NIETC designations.12

B. DOE Violated Section 1221's Requirement to Engage in Meaningful Consultation with States and Tribes.

Section 1221 of EPAct includes specific requirements for DOE to consult with states. It is not clear how thoroughly DOE consulted, but it is clear that DOE is ignoring the significant concerns of states with the NIETC approval process that could override state regulatory decisions and result in condemnation of private property. For instance, the Governors of New York, New Jersey, Connecticut, Pennsylvania, and Virginia have all vocally opposed these designations. Further, there is no evidence that DOE has consulted with potentially affected Tribes whose lands fall within the Southwest and Mid-Atlantic NIETCs.

In order to comply with the requirements of Section 1221, DOE should provide an expanded opportunity for consultation with affected state agencies and Tribes, respond to their recommendations, and give serious consideration to concerns raised by individuals and groups

[12] Compliance with NEPA would provide these opportunities.

not directly associated with the industry proposing new transmission projects; and then make appropriate adjustments to the NIETC designations.

C. DOE Improperly Applied the Term "Corridors" in Designating The Southwest and Mid-Atlantic NIETCs.

Section 1221 directs DOE to designate "corridors." In connection with the designation of energy corridors under the West-wide Energy Corridor Programmatic EIS, which will accommodate not only transmission lines but also oil, gas and hydrogen pipelines, DOE's website defines the term "energy corridor" as "a **parcel of land (often linear in character)** that has been identified through the land use planning process as being a **preferred location** for existing and future **utility rights-of-way**, and that is suitable to accommodate one or more rights-of-way which are similar, identical or compatible." http://corridoreis.anl.gov/guide/basics/index.cfm (emphasis in original). The Bureau of Land Management's regulations define a "right-of-way corridor" as:

> a parcel of land with specific boundaries identified by law, Secretarial order, the land-use planning process, or other management decision, as being a preferred location for existing and future rights-of-way and facilities. The corridor may be suitable to accommodate more than one type of right-of-way use or facility or one or more right-of-way uses or facilities which are similar, identical, or compatible.

43 C.F.R. § 2801.5. This interpretation is further supported by the dictionary definition of corridor. Webster's Deluxe Unabridged Dictionary defines "corridor" as "a strip of land forming a passageway between two otherwise separated parts of a country, or between an inland country and seaport." Webster's Deluxe Unabridged Dictionary (2d ed. 1979) (other definitions include "architecture" definition, "fortification" definition). Thus, no reasonable interpretation of "corridor" can equate to the multi-state, non-linear regions designated by DOE and then cited as an excuse for avoiding NEPA analysis. By designating large geographic regions as "corridors,"

DOE is applying the abridged environmental review and mechanisms to override federal, state and local concerns to an excessively broad area.

In order to remedy this error, DOE should limit the scope of the Southwest and Mid-Atlantic NIETC designations to areas that can more reasonably be considered "corridors."

D. DOE Failed to Complete the Consideration of Alternatives Required by Section 1221 in Designating the NIETCs

As noted above, Section 1221 of EPAct requires DOE to designate NIETCs only "[a]fter considering alternatives and recommendations from interested parties." However, DOE's designation of the Southwest and Mid-Atlantic NIETCs did not include any consideration of alternatives. Further, DOE has declined to consider any solutions to identified congestion other than approving more transmission projects. In the Frequently Asked Questions section of its NIETC website, DOE interprets the subject language as only referring to its consideration "suggestions that National Corridor be designated in relation to different congestion or constraint problems, [or that DOE choose] alternative boundaries for a possible National Corridor, or do something in a particular area other than designate a National Corridor." DOE, Frequently Asked Questions, at 6; *see also* 72 Fed. Reg. 57018. However, there is no support for this overly limited interpretation of the requirement to consider alternatives. Further, as noted above, DOE has not even complied with its own more limited interpretation of the types of alternatives that it should consider.

To comply with the requirements of Section 1221, DOE should consider a range of alternatives to simply designating the Southwest and Mid-Atlantic NIETC designations; then revise the designations accordingly.

D. DOE Has Violated Section 1221 By Establishing a Twelve-Year Term for Its NIETC Designations

DOE has unlawfully set a twelve-year term for its Southwest and Mid-Atlantic NIETC designations. 72 Fed. Reg. at 57014, 57021. Any term longer than three years is inconsistent with Section 1221(a), which requires DOE to issue a report on electric transmission congestion, "[n]ot later than 1 year after August 8, 2005 and *every 3 years* thereafter," in which DOE "may designate" NIETCs. 16 U.S.C. § 824p(a)(1),(2). Because DOE's authority to designate NIETCs is conditioned on the agency's finding of congestion in a study mandated by Section 1221(a), and Section 1221(a) makes clear that DOE must conduct a new congestion study at least "every 3 years," *id.*, DOE's NIETC designations must also be reconsidered on that cycle. Thus, any term longer than three years is impermissible under the plain language of Section 1221(a). The twelve-year term used by DOE could easily result in a designation remaining in place—and facilitating the permitting of projects over federal, state, and local objections—long after the congestion problems that initially prompted the designation have been resolved. To comply with the requirements of Section 1221, DOE must limit the term of the Southwest and Mid-Atlantic NIETCs (and any future NIETCs it chooses to designate) to no more than three years.

VI. DOE Erred by Failing to Consider Consistency with Federal Land Use Plans in Designating the NIETCs

Federal agencies develop land use plans that identify permitted, restricted and prohibited uses. Any subsequent uses of the public lands must be consistent with these plans. *See, e.g.,* Federal Land Policy and Management Act, 43 U.S.C. §§ 1712(a), 1732(a); National Forest Management Act, 16 U.S.C. § 1604(a), (c); National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd. By providing for agency decisions to deny construction permits to be appealed, the NIETC process can violate these land use planning statutes.

To address the legally-mandated need for consistency, the designations of the Southwest and Mid-Atlantic NIETC designations must include a commitment to seek consistency with governing land use plans.

VII. DOE Erred by Failing to Consider Consistency with the Many Federal and State Policies Encouraging or Requiring Use of or Access to Renewable Energy Sources

Federal agencies have enacted policies and made commitments to encourage the use of public lands to support development and transmission of renewable energy. *See, e.g.,* "BLM Launches Effort to Facilitate Renewable Energy Development on Public Lands, *available at* http://www.blm.gov/wo/st/en/info/newsroom/2007/june/NR_0706_1.html ("'The Forest Service looks forward to working in concert with BLM on these geothermal projects,' said Forest Service Chief Gail Kimbell. 'Enhancing our nation's energy needs through safe and clean energy is an important focus of the Department of Agriculture and a proper use of our public lands.'"). In June 2005, BLM completed its programmatic EIS for a Wind Energy Development Program in the western U.S., including public lands within Arizona, Nevada and California. *See* http://windeis.anl.gov/. Indeed, "[i]t is the BLM general policy, consistent with the National Energy Policy of 2001 and the Energy Policy Act of 2005, to encourage development of wind energy in acceptable areas," Instruction Memorandum No. 2006-216 (http://www.blm.gov/nhp/efoia/wo/fy06/im2006-216.htm). Both the BLM geothermal and wind-focused studies built upon a DOI/DOE 2003 study, "Assessing the Potential for Renewable Energy on Public Lands," that included a key finding that of 20 BLM planning units that had high potential for three or more renewable energy resources, 12 occurred in Arizona, California and Nevada. *See* http://www.blm.gov/nhp/spotlight/energy_report/press_release.htm.

Furthermore, many states, including states within the Southwest and Mid-Atlantic NIETCs, have enacted renewable portfolio standards that require electricity providers to obtain a

minimum percentage of their power from renewable energy resources by a certain date. Twenty states plus the District of Columbia have such standards. *See* http://www.eere.energy.gov/states/maps/renewable_portfolio_states.cfm. Standards set by states within the NIETCs are summarized below:

State	Percentage from renewable sources	Date for achieving
Arizona	15%	2025
California	20%	2010
Delaware	10%	2019
D.C.	11%	2022
Maryland	9.5%	2022
New Jersey	22.5%	2021
New York	24%	2013
Pennsylvania	18%	2020
Virginia	12%	2022

Id. By failing to assess energy sources for potential projects affected by the NIETCs or to provide for prioritizing access to transmission for renewable energy sources, DOE is undermining state and federal policies. To address this error, DOE must revise its Southwest and Mid-Atlantic NIETC designations to comply with federal and state policies regarding use of renewable energy sources, including improving access to transmission.

MOTION FOR IMMEDIATE STAY OF DOE'S ORDER DESIGNATING THE SOUTHWEST AND MID-ATLANTIC NIETCs (CONSISTENT WITH 16 U.S.C. § 825*l*(c), 18 C.F.R. 385.713(c), and 5 U.S.C. § 705)

DOE must enter an immediate stay of its October 5, 2007 Order, as to both the Southwest and Mid-Atlantic NIETCs, pending rehearing (if any) and judicial review.[13] An immediate stay is mandated under the ESA, NEPA and the NHPA, which required DOE to fully and publicly analyze—and consult with relevant federal, state or tribal entities regarding—impacts on the environment, endangered or threatened species, and districts, sites, buildings, other structures, and objects listed or eligible for listing in the National Register of Historic Places before designating the NIETCs. An immediate stay is also consistent with the mandates of Section 1221, which required DOE to consider alternatives and consult with affected parties and to comply federal environmental laws before designating the NIETCs, and in the interests of justice under the FPA review provision referenced in DOE's October 5, 2007 Order. 16 U.S.C. §§ 824p(a)(1)-(3), (j); 16 U.S.C. §825*l*(a) (agency may "at any time" "modify or set aside, in whole or in part," any "order" under FPA Section 313); 5 U.S.C. § 705 (agency may stay its action where "justice so requires"); 87 F.E.R.C. P 61197, 61773 (1999) (applying "justice so requires" test to consideration of stay pending rehearing and appeal of order).

Unless DOE's October 5, 2007 Order designating the NIETCs is stayed, FERC may begin issuing construction permits over states' objections as early as October 5, 2008, upon finding that the relevant state entity has withheld or unduly conditioned permit approval for at least a year. 16 U.S.C. § 824p(b)(1)(C). FERC may also attempt to issue permits immediately

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[13] As of the filing of this Application, at least one party has already sought judicial review of DOE's October 5, 2007 Order. *See* http://www.pittsburghlive.com/x/pittsburghtrib/business/briefs/s_536021.html (describing Pennsylvania Public Utilities challenge to DOE Order filed November 2, 2007). Because the Order is illegal for the reasons set forth in this Application and Motion, DOE should stay the Order pending judicial review even if it denies rehearing. *See, e.g.*, 87 F.E.R.C. P 61197 (1999) (administrative order denying rehearing and granting motion for stay pending judicial review of agency order issued under FPA).

upon application—that is, long *before* October 5, 2008—upon a finding that an applicant does not qualify for state permitting or that a state lacks authority to issue the relevant permit or to consider the project's "interstate benefits." *Id.* § 824p(b)(1)(A), (B).

By making its NIETC designations immediately effective, DOE has thus created a strong and immediate incentive for project applicants to simply ignore the concerns of state and federal agencies and private property owners, all of whom are likely to have intimate knowledge of the places to be impacted by the siting or construction of anticipated transmission facilities, in anticipation of a FERC override. DOE has also put strong and immediate pressure on states to rush to approve permit applications they might otherwise have denied or significantly conditioned, in an effort to avoid FERC overrides and the attendant loss of permitting control. *See* SELC Comments at 3-6. In the rush to either obtain or avoid the effect of FERC overrides, both government agencies and the general public will lose the benefit of extended processes, like the American Electric Power Wyoming-Jacksons Ferry process described in the Parties' comments to DOE, in which permit applicants adjust their initial siting and construction proposals to avoid impacts to environmentally sensitive, historically or culturally significant, and other valuable areas in response to federal, state and local concerns. *Id.*; TWS Comments at 1-3 (discussing AEP siting process).

There is already substantial evidence that DOE's NIETC designations have influenced and will continue to influence the siting and construction of anticipated transmission lines. For example, San Diego Gas & Electric has specifically identified its desire to use much of the proposed Southwest Area NIETC for current projects such as the Devers-Palo Verde 2 line and the Sunrise Powerlink. *See* DOE compilation of comments, *available at* http://nietc.anl.gov/documents/docs/NIETC_NOI_compilation_March_9_5pm_final_rev.pdf

("Compilation of Comments"), at 522, 532. Furthermore, San Diego Gas & Electric has indicated that it intends to use or seriously consider using the permitting process available to projects in NIETCs to override denials of these projects by state authorities in California or Arizona. These comments reflect the likelihood both that projects will be sited and constructed in the Southwest NIETC and that project proponents will use DOE's NIETC designation to obtain FERC construction permits in the event the projects are not approved by state authorities.

There is also substantial evidence that DOE's Mid-Atlantic NIETC designation is having substantial, immediate impacts on transmission line siting and construction. For example, the comments of PJM Interconnection request designation of NIETCs to permit development of projects in the "Allegheny Mountain Path" and the "Delaware River Path," highlighting the "immediate need" for approval of projects and showing the likelihood of projects being constructed in the Mid-Atlantic NIETC, as well. *See* Compilation of Comments at 441, 445-447.

Once a project applicant has obtained a FERC override permit, Section 1221(e) purports to authorize that applicant to use the federal power of eminent domain to condemn private lands. *See* 16 U.S.C. § 824p(e). The applicant may also appeal, directly to the President, any failure to authorize construction through federal lands outside a national park, monument, wildlife refuge, wilderness, wild and scenic river, or national trail. *Id.* § 824p(h)(6). The Parties anticipate that federal agencies—whether they administer lands subject to or exempt from appeal—will face extreme pressure to approve projects in NIETCs, especially when construction on all surrounding state and private lands has already been authorized by FERC overrides and/or state approvals and subsequent exercises of eminent domain.

In short, DOE's NIETC designations unquestionably have immediate, significant, on-the-ground impacts that DOE was required to analyze under NEPA, the ESA, and the NHPA before

issuing its October 5, 2007 Order. The Order must therefore be stayed until DOE has completed all legally required environmental and historical analyses and consultations on the impacts of the NIETCs. *See, e.g.*, *NRDC v. Houston*, 146 F.3d 1118, 1127-28 & n.6 (9th Cir. 1998) (agency action that commits resources before agency has completed its ESA Section 7(d) consultation violates the ESA); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (agency actions undertaken without adequate ESA consultation are presumed to violate ESA Section 7); *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1034 (9th Cir. 2005) (agency action may be enjoined "pending completion of section 7(a)(2) requirements" for consultation under the ESA); *Nat'l Parks & Cons. Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2002) ("allowing a potentially environmentally damaging project to proceed prior to [EIS] preparation runs contrary to the very purpose of [that] requirement" in NEPA); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (holding federal agency actions for which agency failed to conduct NHPA consultation and failed to prepare EIS "must be undone"). Because a stay is necessary to avoid continued violations of federal law and potentially irreparable harm to the environment and historically significant resources, it is also warranted established administrative law principles and under the FPA review provision referenced in DOE's Order. *See* 87 F.E.R.C. P 61197, 61733 (1999) (applying 5 U.SC. § 705 "justice so requires" standard, which involves consideration of the public's interests and the prospect of irreparable harm, in determining whether to stay order issued under the FPA).

CONCLUSION

DOE has designated the Southwest Area NIETC and the Mid-Atlantic NIETC in violation of its obligations under NEPA, the ESA, the NHPA, and the EPAct . For all of the foregoing reasons, and those presented in the Parties' aforementioned comments and elsewhere in DOE's rulemaking record, the Parties respectfully request that DOE both (1) immediately stay its October 5, 2007 Order in Docket Numbers 2007-OE-01 and 2007-OE-02 for the duration of any rehearing and judicial review; and (2) within 30 days of this Application, either deny rehearing or grant rehearing and issue a ruling, final for purposes of judicial review under 16 U.S.C. § 825*l*(b), on the merits of that Order.

Respectfully submitted,

Nada Culver, Senior Counsel
The Wilderness Society
1660 Wynkoop Street, Suite 850
Denver, CO 80202
303-650-5818 Ext. 117
Nada.Culver@tws.org

Johanna Wald, Senior Attorney
Anjali Jasiwal, Senior Attorney
Selena Kyle, Attorney
Natural Resources Defense Council
111 Sutter St., 20th floor
San Francisco, CA 94104
415-785-6113
jwald@nrdc.org

Nicole Rosmarino, Conservation Director
Forest Guardians
312 Montezuma Ave.
Santa Fe, NM 87501
505-988-9126 Ext. 1156
nrosmarino@fguardians.org

Tom Darin
Staff Attorney, Energy Transmission
Western Resource Advocates
2260 Baseline Rd., Suite 200
Boulder, CO 80302
303-444-1188 Ext. 244
tom@westernresources.org

Brent Schoradt, Deputy Policy Director
California Wilderness Coalition
1212 Broadway, Suite 1700
Oakland, California 94612
510-451-1450
bschoradt@calwild.org

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